

No. 11353

United States
Circuit Court of Appeals
For the Ninth Circuit.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Appellants,

vs.

UNITED STATES OF AMERICA, for the use of
BERT TURNER, FRANK E. HINMAN and
GARLAND, D. ENGLAND,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

AUG 8 - 1946

PAUL P. O'BRIEN,

CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Answer of Defendants Basich Brothers Construction Co. and Hartford Accident and Indemnity Co.	34
Appeal:	
Certificate of Clerk to Transcript of Record on	49
Notice of	48
Statement of Points on	96
Certificate of Clerk to Transcript of Record on Appeal	49
Complaint Under the Miller Act for Labor and Material Furnished on Government Contract	2
Judgment	46
Notice of Appeal to Circuit Court of Appeals..	48
Notice of Appeal to Circuit Court of Appeals..	46
Order Upon Pre-Trial Conference Pursuant to Rule 16	39
Statement of Points on Appeal.....	96
Summons	32

Transcript of Evidence and Proceedings.....	51
---	----

Exhibits for Plaintiff:

A—Contract for Construction	53
B—Excerpts from Specifications for Taxiways, Warm-Up and Parking Aprons	55
C—Payment Bond	67
Set out in full	11
D—Subcontract Agreement	68
Set out in full	13
E—Subcontract Bond	68
Set out in full	28

Witnesses for Plaintiff:

Hampton, Clarence

—direct	77
—cross	81
—redirect	84

Turner, Bert

—direct	87
—cross	88
—redirect	88

Ward, Lee

—direct	84
—cross	86

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

No. Civil 320-Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK E. HINMAN, and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants.

COMPLAINT UNDER THE MILLER ACT FOR
LABOR AND MATERIAL FURNISHED
ON GOVERNMENT CONTRACT

Comes now the Plaintiff and for cause of action
against the Defendants, complains and alleges:

I.

The jurisdiction of the above entitled Court in
this action depends upon the following facts: that
the defendant, Basich Brothers Construction Co.,
made and entered upon the performance of a con-
tract, exceeding \$2,000.00 in amount, with the
United States of America for public work, which
said contract was to be and was performed and ex-
ecuted in the County of Pima, State of Arizona;
that the defendant, Hartford Accident and Indem-

nity Company, was and is a corporate surety upon a payment bond furnished by said Basich Brothers Construction Co., to the United States of America for the payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, all under, and pursuant to, the Act of Congress known as the Miller Act, approved August 24, 1935, c 642, 49 Stat. 793, 40 USCA 270a, et seq., 9A FCA title .40, 270a et seq; [8] and the further fact that the said use plaintiffs furnished labor and material in the prosecution of the work provided for in such contract, for which payment, although due, has not been made, as hereinafter more particularly alleged and set forth.

II.

That the said use plaintiffs, Bert Turner, Frank E. Hinman and Garland D. England, are and were in all times hereinafter mentioned, citizens and residents of the State of Arizona.

III.

That the defendant, Basich Brothers Construction Co., is a corporation, organized and existing under the laws of the State of California, and that the defendant Hartford Accident and Indemnity Company is a body corporate, duly incorporated under the laws of the State of Connecticut, and as Plaintiff is informed and believes and therefore alleges, authorized to act as surety under Act of Congress approved August 13, 1894 and amended by Act of Congress approved March 23, 1910.

IV.

That on or about the 25th day of January, 1945, the defendant, Basich Brothers Construction Co., made and entered into a certain contract with the Government of the United States for furnishing the material and for performing the work (except material and equipment designated to be furnished by the Government) for constructing taxiways, warm-up and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities, Job, No. Davis-Monthan ESA 210-6, 210-8 and 210-9, at Davis-Monthan Field, Tucson, Arizona (Contract No. W-04-353-Eng.-1302, in the amount of \$942,816.00).

V.

That for the purpose of complying with the said Act of Congress requiring said contractor to furnish a bond for the [9] protection of all persons supplying labor and materials in the prosecution of the work provided in said contract for the use of each such person, the said contractor and the said defendant Hartford Accident and Indemnity Company did make and enter into a payment bond, copy of which is hereunto annexed, marked "Exhibit A" and for all purposes by reference made a part of this complaint. And said payment bond was furnished to and accepted by the Government for the purpose aforesaid. And thereupon the said contractor entered upon the performance and execution of said contract.

VI.

That in the doing and performance of said contract, by said contractor, large quantities of rock, sand, gravel, concrete, cement, asphalt, and similar materials were required by said contractor to be used by said contractor in and upon the improvements and facilities to be made and constructed under the terms of said contract. That for the purpose of obtaining rock, gravel, sand and other materials, to be used by said contractor in performance of said contract, the said contractor employed Andrew Duque and Carson Frazzini, a copartnership, doing business under the name of Duque and Frazzini, General Contractors, as sub contractors, to extract such materials from certain pits and premises in the vicinity of said Davis-Monthan air base, in Pima County, Arizona, designated by said contractor, and to prepare such materials for use by said contractor in the performance of said contract and under contractor's direction and supervision, and for that purpose said contractor made and entered into a sub-contract agreement with said Duque & Frazzini, copy of which is hereunto annexed and marked "Exhibit B" and for all purposes by reference is made a part of this complaint. [10]

VII.

That said contractor, among other things, required said sub-contractor Duque & Frazzini to furnish contractor with a 100% combination bond (labor, materials, and performance) pursuant to which requirement the said sub-contractor did furnish such

bond in the principal sum of \$101,745.55 with the Glens Falls Indemnity Company of Glens Falls, N.Y. as surety thereon, copy of which bond is hereto attached, marked "Exhibit C" and for all purposes by reference made a part hereof. Thereupon the said contractor entered upon the performance of the work required under terms of said sub-contract agreement.

VIII.

That thereafter on or about the 19th day of March, 1945, the said sub-contractor, Duque & Frazzini, rented certain equipment consisting of trucks, from the use plaintiff, Bert Turner, to be used and which were used in the performance of work and the production of materials under said sub-contract agreement between said Duque & Frazzini and said prime contractor, Basich Brothers Construction Co., and said equipment was used in the performance of work provided for in said contract with the United States government above referred to.

That said use plaintiff's trucks were used by said sub-contractor under said rental agreement for a period of 911½ hours from March 20, 1945 to and including May 1, 1945, for which use said Duque & Frazzini agreed to pay to said Bert Turner, rental at the rate of \$1.25 per hour, a total amount of \$1,139.38; and from May 2, 1945 to and including June 8, 1945 said trucks were rented for 723 hours, for which use the said sub-contractor agreed to pay said Bert Turner at the rate of \$1.75 per hour, a total amount of \$1,265.25. That the total sum and amount past

due and owing said Bert Turner for rental of said [11] trucks for said period of time amounts to the sum of \$2,404.63, no part of which has been paid by said Duque & Frazzini or by any person, or at all, although demand has been repeatedly made upon said prime contractor and said sub-contractor for payment thereof.

That June 8, 1945 was the last date on which said Bert Turner furnished or rented such trucks for which claim is made; that within 90 days from said June 8, 1945, said Bert Turner gave written notice to said contractor, Basich Brothers Construction Co., of his claim for labor and material so furnished and supplied as aforesaid, stating the amount of said claim and the name of the parties to whom the material was furnished and supplied and for whom the labor was done and performed by him as aforesaid. Such notice was served by mailing the same, by registered mail postage prepaid, in an envelope addressed to said contractor, Basich Brothers Construction Co., at its place of business in both Tucson, Arizona, and Alhambra, California.

IX.

That on or about the 18th day of April, 1945, the said sub-contractor, Duque & Frazzini, rented certain equipment consisting of trucks, from the use plaintiff Frank E. Hinman, to be used and which were used in the performance of work and the production of material under said sub-contract agreement between said Duque & Frazzini and said prime contractor, Basich Brothers Construction Co., and

said equipment was used in the performance of work provided for in said contract with the United States Government above referred to.

That said use plaintiff's trucks were used by said sub-contractor under said rental agreement for a period of 362½ hours, from April 18, 1945, to and including May 1, 1945, for [12] which use said Duque & Frazzini agreed to pay said Frank E. Hinman rental at the rate of \$1.25 per hour, or a total of \$453.13; and from May 2, 1945 to and including June 8, 1945, said trucks were rented for 744½ hours, for which use the said sub-contractor agreed to pay said Frank E. Hinman rental at the rate of \$1.75 per hour or a total amount of \$1,302.87.

In addition to that, on or before June 8, 1945, the said Frank E. Hinman performed one day's labor for said sub-contractor, in the doing of said work at an agreed price of \$15.00 per day.

That the total claim for truck rental and labor, past due and owing said Frank E. Hinman for said period of time amounts to the sum of \$1,771.00, no part of which has been paid by said Duque & Frazzini or by any person, or at all, although demand has been repeatedly made upon said prime contractor and said sub-contractor for payment thereof.

That June 8, 1945 was the last date on which said Frank E. Hinman performed labor or furnished such trucks for which claim is made; that within 90 days from said June 8, 1945, said Frank E. Hinman gave written notice to said contractor, Basich

Brothers Construction Co., of his claim for labor and material furnished and supplied as aforesaid, stating the amount of said claim and the name of the parties to whom the material was furnished and supplied and for whom the labor was done and performed by him as aforesaid. Such notice was served by mailing the same, by registered mail postage prepaid, in an envelope addressed to said contractor, Basich Brothers Construction Co., at its place of business in Tucson, Arizona.

X.

That on or about the 2nd day of May, 1945, the said sub-contractor, Duque & Frazzini, rented certain equipment consisting [13] of trucks, from the use plaintiff, Garland D. England, to be used and which were used in the performance of work and the production of materials under said sub-contract agreement between said Duque & Frazzini and said prime contractor, Basich Brothers Construction Co., and said equipment was used in the performance of work provided for in said contract with the United States Government above referred to.

The said use plaintiff's trucks were used by said sub-contractor under said rental agreement for a period of 165 hours from May 2, 1945 to and including May 31, 1945, for which use said Duque & Frazzini agreed to pay to said Garland D. England, rental at the rate of \$1.75 per hour, a total of \$288.75; and from June 1, 1945 to and including June 7, 1945 said trucks were rented for 41½ hours, for which use the said sub-contractor agreed to pay said

Garland D. England, rental at the rate of \$1.75 per hour, a total amount of \$72.62. That the total sum and amount past due and owing said Garland D. England for rental of said trucks for said period of time amounts to the sum of \$361.37, no part of which has been paid by said Duque & Frazzini or by any person, or at all, although demand has been repeatedly made upon said prime contractor and said subcontractor for payment thereof.

That June 7, 1945 was the last day on which said Garland D. England furnished or rented such trucks for which claim is made; that within 90 days from said June 7, 1945, said Garland D. England gave written notice to said contractor, Basich Brothers Construction Co., of his claim for labor and material furnished and supplied as aforesaid, stating the amount of said claim and the name of the parties to whom the material was furnished and supplied and for whom the labor was done and performed by him as aforesaid. Such notice was served by [14] mailing the same, by registered mail postage prepaid, in an envelope addressed to said contractor, Basich Brothers Construction Co., at its place of business in Tucson, Arizona.

Wherefore the Plaintiff Demands Judgment of the defendants and each of them as follows:

1. In the sum of \$2,404.63 for the use and benefit of the said Bert Turner;
2. In the sum and amount of \$1,771.00 for the use and benefit of the said Frank E. Hinman;

3. In the sum and amount of \$361.37 for the use and benefit of said Garland D. England.

4. For costs of said use plaintiffs in the prosecution of this action and for other relief as may be proper in the premises.

/s/ CLIFFORD R. McFALL

Attorney for the Plaintiff

EXHIBIT "A"

PAYMENT BOND

(Construction)

Pursuant to the Act of Congress, Approved August 24, 1935 (49 Stat. 793; 40 U.S. Code s270a.)

Know All Men By These Presents, That we, Basich Brothers Construction Co., a corporation organized and existing under the laws of the State of California of the city of Alhambra, in the State of California, as Principal, and Hartford Accident and Indemnity Company, a body corporate, duly incorporated under the laws of the State of Connecticut, and authorized to act as surety under the Act of Congress approved August 13, 1894, as amended, by the Act of Congress approved March 23, 1910, whose principal office is located in the City of Hartford, as surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of four hundred seventy-one thousand four hundred eight and 00/100 (\$471,408.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs,

executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition Of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated 25 January, 1945, for furnishing the materials, and performing the work (except materials and equipment designated to be furnished by the Government) for constructing taxiways, warm-up and parking aprons, airfield lighting, drainage facilities and water service line, together with appurtenant facilities, Job. No. Davis-Monthan ESA 210-6, 210-8, and 210-9, at Davis-Monthan Field, Tucson, Arizona (Contract No. W-04-353-Eng.-1302, in the amount of \$942,816.00). [16]

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 25th day of January, 1945, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by the undersigned representative, pursuant to authority of its governing body.

In presence of—

Attest:

**BASICH BROTHERS CON-
STRUCTION CO.**

(Corporate Principal)

(Business Address): P.O. Box 151, 600 South
Fremont Avenue, Alhambra, California.

/s/ DEENIE COULSON

By /s/ N. L. BASICH
President

Attest:

**HARTFORD ACCIDENT AND
INDEMNITY COMPANY**

(Corporate Surety)

(Business Address): 548 So. Spring St., Los An-
geles, Calif.

/s/ ELEANOR G. DAVIS

By /s/ JOE H. BROCK
Attorney-in-Fact

The rate of premium on this is \$5.00 per thousand.
Total amount of premium charges, \$ inc. in Perf.
Bond. [17]

EXHIBIT "B"

SUBCONTRACT AGREEMENT

This Agreement, made this 7 day of February
1945 by and between Basich Brothers Construction

Co., 600 S. Fremont Ave., Alhambra, California, party of the first part, hereinafter called the Contractor, and Duque & Frazzini, P. O. Box 73, Tonopah, Nevada, party of the second part, hereinafter called the Sub-contractor, witnesseth: that

Whereas, the Contractor has heretofore entered into a Contract hereinafter referred to as the original contract, dated January 25, 1945 with War Department, U. S. Engineer Office, 751 S. Figueroa St., Los Angeles, California, hereinafter called the Principal, for the Construction of Taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.—1302 which contract includes the following described work to be done under this agreement;

Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18" -12" -18" portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2.

Now, Therefore, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, the

Contractor and the Subcontractor do hereby mutually agree as follows:

Article I. Performance of Work.

The Subcontractor shall furnish all materials, supplies and equipment, except as otherwise herein provided, and perform all labor required for the completion of the said work in accordance with all provisions of the original contract and of the specifications and plans referred to therein, all of which are hereby made a part of this agreement, and under the direction and to the satisfaction of the Principal's engineer or other authorized representative in charge of said work.

Article II. Commencement of Completion of Work.

The work shall be commenced not later than February 19, 1945, and shall be completed on or before June 3, 1945.

Article III. Changes in the Original Contract.

It is mutually agreed and understood that the Contractor is not an insurer or guarantor of the said work or of any part thereof, or of the performance by the Principal of the original contract as specified therein, or otherwise, and that the Subcontractor shall be bound by any changes or alterations made by the Principal in the said original contract, specifications or plans, or in the amount or

character of said work or any part thereof, to the same extent that the Contractor is bound thereby.

Article IV. Liability of Subcontractor.

The Subcontractor shall hold and save the Contractor harmless from any liability for damage to the said work, or for injury or damage to persons or property occurring on or in connection therewith.

Article V. Warning Signals, Barricades, Etc.

The Subcontractor shall provide, erect and maintain proper warning signals, signs, lights, barricades and fences on and along the line of said work, and shall take all other necessary precautions for the protection of the work and safety of the public.

Article VI. Compensation and Public Liability Insurance.

The Subcontractor, shall at his own expense, provide workman's compensation insurance in accordance with the requirements of the original contract and of all Federal, State and/or municipal laws, ordinances and regulations relating thereto; also, insurance against liability for injury to persons and/or property occurring on or in connection with the work; Provided, that if the Subcontractor fails to provide such insurance, the Contractor is authorized to provide the same and to deduct the amounts of the premiums payable therefor from any moneys at any time due the Subcontractor under this agreement.

Article VII. Patents.

The Subcontractor shall hold and save the Contractor harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, appliance or process furnished or used in or in connection with the performance of the said work.

Article VIII. Subletting and Assignment.

The work shall be performed by the Subcontractor with the assistance of workmen under his immediate superintendence, and shall not be sublet, assigned or otherwise disposed of, either in whole or in part, except with the written consent of the Contractor.

Article IX. Other Subcontracts.

The Subcontractor shall cooperate fully with other subcontractors employed on the work, and shall so plan and conduct his work as not to interfere with their operations or with those of the Contractor. The Contractor will not be responsible for any delays or interference resulting from the acts or operations of other subcontractors.

Article X. Settlement of Controversies.

In the event any controversies should arise, the Contractor and the Subcontractor each will elect a representative, and the representative will in turn elect a third disinterested party to settle controversies. All decisions will be final.

Article XI. Payment for Labor and Supplies.

The Subcontractor shall promptly make payment to all persons supplying him with labor, materials and supplies for the prosecution of the work or in connection therewith. Any such payments not made by the Subcontractor when due may be made by the Contractor and the amounts thereof deducted from any moneys at any time due the Subcontractor under this agreement. [19]

Article XII. Completion Work by Contractor.

If the Subcontractor shall fail to commence the work within the specified time, or to prosecute said work continuously with sufficient workmen and equipment to insure its completion the Contractor within five (5) days will reserve the right to compel the Subcontractor to move in another plant. All cost in connection with moving in, moving out, erection, dismantling, operation, and any other cost in connection with operating and maintaining plant will be paid by the Subcontractor. In the event Basich Brothers Construction Co. plant is used, moving in and moving out expense will be paid by Basich Brothers Construction Co.

Article XIII. Extension of Time.

No extension of the time herein specified for completion will be made in consideration of delays or suspension of work due to the fault or negligence of the Subcontractor, and no extension will be granted that will render the Contractor liable for penalty or damages under the original contract.

Article XIV. Claims for Extra Work or Damages.

The Contractor will pay, for extra work performed and materials furnished by the Subcontractor under written authorization by the Principal's engineer, the actual cost thereof plus a percentage of said cost equal to one-half the percentage received by the Contractor, as and when he is paid therefor by the Principal.

Article XV. Basis and Scope of Payment.

Payment will be made to the Subcontractor for work actually performed and completed, as measured and certified to by the Principal's engineer, at the unit prices hereinafter specified, which prices shall be accepted by the Subcontractor as full compensation for furnishing all material and for doing all work contemplated and embraced in this agreement; also all loss and damage arising out of the nature of the work aforesaid, and for all risks of every description connected with the said work; also for all expense incurred by the Subcontractor by or in consequence of the suspension or discontinuance of the work.

Article XVI. Partial Payment.

Partial payments for work performed under this agreement will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile. In the event the Subcontractor is indebted to the Contractor for cash advances, supplies, materials, equipment, rental,

labor, insurance on labor, or other proper charges against the work, the amount of such indebtedness may be deducted from any payment or payments made under this provision.

Article XVII. Final Payment.

Upon the completion of the Subcontractors contract, the Contractor will pay the remaining amount due him under this agreement within 30 days. All prior partial payments shall be subject to correction in the final payment; Provided, that if, on completion of the said work by the Subcontractor and prior to the completion of the original contract as a whole, the Subcontractor shall demand and receive full payment for his work according to the computations of the Principal's Engineer, any changes thereafter made in said computations shall not inure in whole or in part to the benefit or loss of the Subcontractor. Final payment as herein provided shall release the Contractor from any further obligation whatsoever in respect to this agreement.

Article XVIII. Failure to Enforce Provisions Not a Waiver.

The failure of the Contractor to enforce at any time any of the provisions of this contract or to require at any time performance by the Subcontractor of any of the provisions hereof, shall in no way be construed to be a waiver, nor in any way to affect the validity of this agreement or any part thereof or the right of the Contractor to thereafter enforce each and every such provision.

Article XIX. Penalties.

It is understood that any fines, penalties, levies, assessments, or charges for liquidated damages of any nature made by the Principal upon the Contractor for work done under this agreement will be charged to the Subcontractor.

Article XX. Delays.

The Subcontractor shall have no claim for damages due to delays in delivery of material or failure of the Principal to provide Right Of Way, plans, stakes, or delay from any cause whatsoever.

Article XXI. Special Provisions.

1—All materials to be taken from Mr. and Mrs. Gollbs property.

2—Basich Brothers Construction Co. to pay for all royalties for materials. In the event Mr. and Mrs. Gollbs material pit is exhausted, Basich Brothers Construction Co. will pay royalties for other material in the immediate vicinity.

3—Duque & Frazzini to submit weekly payrolls by Monday night of each week for the previous week which closes on Saturday at Midnight to Basich Brothers Construction Co. Basich Brothers Construction Co. to pay labor, compensation, insurance, public liability, property damage, Arizona employment insurance, Federal Old Age, Excise Tax on Employers and any other insurance on labor and charge same to Duque & Frazzini, which amounts are to be deducted from amount earned.

4—Duque & Frazzini to pay Arizona Tax Commission for privilege of doing business in Arizona.

5—Duque & Frazzini to erect two plants, each to produce 800 c.y. of suitable material to be used in connection with the contract.

6—Duque & Frazzini to stockpile rock and sand for concrete pavement nearest to second party's plant. Same thing applies to rock and sand for asphalt concrete pavement.

7—Rock furnished for Items 21 and 22 shall be 3" (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3" maximum rock.

8—Permission is hereby granted to Duque & Frazzini to subcontract a portion of their contract to Vegas Rock & Sand Co., Las Vegas, Nevada. [21]

Article XXI (a) Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

If this Subcontract is in excess of one hundred thousand dollars, (\$100,000.00), the Subcontractor agrees to renegotiate his contract prices pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528.

(a) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the contractor under this contract can be determined with reasonable certainty, the Secretary of

War and the contractor, upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall be retained by the Government or repaid to the Government by the contractor, as directed by the Secretary of War.

(c) Each Fixed-priced or lump sum subcontract in an amount in excess of \$100,000.00 entered into by the contractor hereunder shall include the following provisions:

1—At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the Subcontractor under this contract can be determined with reasonable certainty, the Secretary of War and the Subcontractor, upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

2—In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Secretary of War,

(A) Be deducted by the Contractor from payments to the Subcontractor under this contract; or

(B) Be paid by the Subcontractor directly to the Government; or

(C) Be repaid by the Subcontractor to the Contractor.

3—The Subcontractor agrees that the Contractor shall not be liable to the Subcontractor for or on any amount repaid to the Contractor or paid to the Government by the Subcontractor or deducted by the Contractor from payments under this contract, pursuant to directions from the Secretary of War in accordance with the provisions of this Article. Under its contract with the Government all amounts repaid by or withheld from the Subcontractor hereunder.

4—The term “Secretary of War” as used herein includes his duly authorized representatives.

(d) If any renegotiation between the Secretary of War and any Subcontractor pursuant to the provisions required by paragraph (c) hereof results in a reduction of the contract price of the subcontract, the Government shall retain from payments to the Contractor under this contract, or the Contractor shall repay to the Government, as the Secretary of War may direct, the amount of such reduction, less any amounts paid thereon by the Subcontractor directly to the Government.

(e) The term “Secretary of War” as used herein includes his duly authorized representatives. [22]

Article XXII. Bond Provision.

Duque & Frazzini to furnish 100% Combination Bond (labor, material, and performance). Basich Brothers Construction Co. will pay for said bond.

Article XXIII. Schedule of Subcontract Unit Prices With Approximate Quantities and Amounts.

Item	Approximate Quantity	Unit	Description	Unit Price	Approximate Amount
9	15,300	c.y.	Gravel embankment. Gravel embankment shall be put in bin by second party and hauled away by first party. Any over-production that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	7,038.00
11	9,000	c.y.	Gravel for stabilized sub-grade under gravel base course. Gravel shall be put in bin by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Measurement to be computed on truck water level.	.40	3,600.00
15	42,530	c.y.	Gravel for base course. Gravel shall be put in bin by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	

Item	Approximate Quality	Unit	Description	Unit Price	Approximate Amount
21	49,600	c.y.	Rock and sand for 18"-12"-18" Portland cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehandled by first party. Engineers measurement for concrete will be used to govern quantities.	1.05	
22	6,320	c.y.	Rock and sand for 10" Portland cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehandled by first party. Engineers measurement for concrete will be used to govern quantities.	1.05	
26A	8,535	tons	Rock and sand for binder course asphaltic concrete Class 1.	.65	
26B	11,200	tons	Rock and sand for wearing course asphaltic concrete Class 2. Rock and sand for Items 26A and 26B, shall be put in stockpile by second party and rehandled by first party. Engineers weights for various classes of asphalt concrete will be used to govern quantities; however, oil used is to be removed first before tonnage computed.	.65	

Article XXIV. Damages for Delay in Completion.

If the Subcontractor shall fail to complete the said work within the time and in the manner speci-

fied, or within the time of such extensions as may be granted, he shall forfeit and pay to the Contractor the sum of the amount assessed by U. S. Engineer Office, per day for each calendar day that he is in default according to the terms hereof, which sum the Contractor shall retain as liquidated damages.

Article XXV.

It is mutually agreed that time is of the essence of this agreement, and that it contains the whole and entire understanding of the parties hereto, and that it shall bind their heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said parties have hereunto set their hands the day and year above written.

BASICH BROS. CONSTRUCTION CO.,

By /s/ N. L. BASICH,

Party of the First Part.

DUQUE & FRAZZINI,

By /s/ CARSON FRAZZINI,

Party of the Second Part.

EXHIBIT "C"

Glens Falls Indemnity Company
Of Glens Falls, New York

SUB-CONTRACT BOND

Know All Men By These Presents, That we, Duque & Frazzini of Tonopah, Nevada (hereinafter called the Principal) as Principal and Glens Falls Indemnity Company, of Glens Falls, New York (hereinafter called the Surety) as Surety, are held and firmly bound unto Basich Brothers Construction Co., 600 S. Fremont, Ave., Alhambra, California (hereinafter called the Obligee) in the sum of One Hundred Thousand Seven Hundred Forty-five and 55/100 (\$107,745.55) Dollars, for the payment whereof said Principal and Surety bind themselves firmly by these presents.

Whereas, the Principal has entered into a written contract dated February 7th, 1945, with the Obligee for the construction of taxiways, warm-up and parking aprons, Job. No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng. 1302, a copy of which is or may be hereto annexed.

Now, Therefore, the Condition of This Obligation Is Such, that if the Principal shall faithfully perform the work contracted to be performed under said contract, and shall pay, or cause to be paid in full, the claims of all persons performing labor upon or furnishing materials to be used in, or furnishing appliances, teams or power contributing to

such work, then this obligation shall be void; otherwise to remain in full force and effect.

This bond is executed for the purpose of complying with the laws of the State of Arizona, and shall inure to the benefit of any and all persons who perform labor or furnish materials to be used in, or furnish appliances, teams or power contributing to the work described in said contract, so as to give such persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for by the laws of the State of Arizona, or in a separate suit brought on this bond. No right of action shall accrue hereunder to or for the use of any person other than the Obligee except as such right of action may be given by the Mechanics' Lien Laws of the State of Arizona to persons performing labor or furnishing materials, appliances, teams or power as aforesaid. The total amount of the surety's liability under this bond, both to the Obligee and to persons furnishing labor or material, appliances, teams or power, shall in no event exceed the penalty hereof.

The Principal and Surety further agree to pay all just labor claims arising under said contract, within two (2) weeks after demand, and to waive the filing of lien claims or giving written notice required by Statute as a condition to bringing suit to enforce the same.

Provided, however, as to said Obligee, and upon the Express Conditions, the performance of each of

which shall be a condition precedent to any right of recovery hereon by said Obligee:

First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by Registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the [25] architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

Second: That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract

may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.

Third: That the Surety shall not be liable for any damages resulting from strikes, or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes, nor for damages from injury to, or the death of, any persons, nor for the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished, or the maintenance thereof, or repairs thereto, nor for the furnishing of any bond or obligation other than this instrument.

Signed, Sealed and Dated this 20th day of February, 1945.

DUQUE & FRAZZINI,
By CARSON FRAZZINI.

GLENS FALLS INDEMNITY
COMPANY,
By HARRY LEONARD,

Attorney.

(Corporate Seal.)

[Endorsed]: Filed Sept. 18, 1945. [26]

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Clifford R. McFall, plaintiff's attorney, whose address is 402 Valley National Bank Building, Tucson, Arizona, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] EDWARD W. SCRUGGS,
 Clerk of Court.

By /s/ JEAN E. MICHAEL,
 Deputy Clerk.

Date: September 18, 1945.

7-1615

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [27]

RETURN ON SERVICE OF WRIT

United States of America,
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Basich Brothers Construction Co., a corporation, by delivering a copy of said Summons with Complaint attached, to which was attached Exhibits A, B, and C, to T. De Witt Talmage, Statutory Agent for said Cor-

poration for Pima County in the State of Arizona, and at the same time and place showing him the original Summons at 601 North Stone Avenue, Tucson, Arizona, in said District on the Nineteenth day of September, 1945, at 9:57 a.m.

Service, \$2.00; Travel, .06; total, \$2.06.

B. J. McKINNEY,

U. S. Marshal.

By /s/ EDMUND L. SCHWEPPE,
Deputy.

RETURN ON SERVICE OF WRIT

I hereby certify and return that on the 21st day of September, 1945, I received the within summons and served same on Hartford Accident and Indemnity Co., a corporation, by making substitute service upon the Arizona Corporation Commission and delivering to Wilson T. Wright, Chairman of Arizona Corporation Commission, copy of Summons to which was attached copy of Complaint and copy of Exhibits A, B, and C, and at the same time showing Mr. Wright the original Summons in his office in the Capitol Annex Building, Phoenix, at 10:45 AM on the 25th day of September, 1945.

Marshal's Fees: Travel, \$.20; Service, \$2.00; total \$2.20.

B. J. McKINNEY,

United States Marshal.

By M. CASSIE BAKER,

Deputy United States Marshal.

[Endorsed]: Filed Oct. 3, 1945. [30]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS BASICH BROTHERS CONSTRUCTION COMPANY AND HARTFORD ACCIDENT AND INDEMNITY COMPANY

Come now the above-named defendants, Basich Brothers Construction Company, a corporation, and Hartford Accident and Indemnity Company, a corporation, and, as and for answer to plaintiff's complaint on file herein, admit, allege and deny as follows:

I.

Admit the allegations of Paragraph I of said complaint with the exception of that portion thereof that "said use plaintiffs furnished labor and material in the prosecution of the work provided for in such contract, for which payment, although due, has not been made, as hereinafter more particularly set forth." [31] Defendants deny that said use plaintiffs furnished labor or material in the prosecution of said work but allege that any labor or material furnished by said use plaintiffs or any of them was for third parties in the production of material which said material was thereupon purchased by said defendant Basich Brothers Construction Company from said third parties and thereupon the material so purchased was used in the prosecution of said work. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the alleged payment has not been made for the labor and material alleged to have

been furnished by said use plaintiffs and, basing their denial thereon they deny the same.

Admit all of the allegations of Paragraphs II, III, IV, V and VI of said complaint.

III.

Admit all of the allegations of paragraph VI of said complaint except as herein specifically denied. Deny that defendant Basich Brothers Construction Company employed Andrew Duque and Carson Frazzini as therein alleged but that said Andrew Duque and Carson Frazzini were independent contractors required to furnish said defendant with material as specified in the agreement attached to said complaint and marked "Exhibit B." Deny that said Andrew Duque and Carson Frazzini were to extract materials from certain pits designated by said defendant or that they were to perform their said contract with defendant under said defendant's direction or supervision. That the rights and obligations of the respective parties to said contract so marked "Exhibit B" are only those therein specifically set forth.

IV.

Defendants deny that the equipment alleged in Paragraph VIII of said complaint to have been rented by use plaintiff [32] Bert Turner, to Duque & Frazzini was used in the performance of work provided for in said contract with the United States Government therein referred. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations

set forth in said Paragraph VIII of said complaint except as herein otherwise alleged and basing their denial thereon they deny the same. Defendants admit the service of written notice within ninety days from June 8, 1945, as therein alleged.

V.

Defendants deny that the equipment alleged in Paragraph IX of said complaint to have been rented by use plaintiff, Frank E. Hinman, to Duque & Frazzini was used in the performance of work provided for in said contract with the United States government as therein alleged. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations set forth in said Paragraph IX of the complaint except as herein otherwise alleged and basing their denial thereon they deny the same. Defendants admit the service of written notice within ninety days from June 8, 1945, as therein alleged.

VI.

Defendants deny that the equipment alleged in Paragraph X of said complaint to have been rented by use plaintiff, Garland D. England, to Duque & Frazzini was used in the performance of work provided for in said contract with the United States Government as therein alleged. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations set forth in said Paragraph X of said complaint except as herein otherwise alleged and basing their

denial thereon they deny the same. Defendants admit the service of written notice within ninety days from June 7, 1945, as [33] therein alleged.

For and as a Separate Defense to Each of the Causes of Action Alleged in the Complaint on File Herein, Defendants Allege:

I.

That the equipment alleged to have been furnished by each of the use plaintiffs in said action to said Duque & Frazzini, and any labor alleged to be performed by any of them were not supplied in the prosecution of the work provided for in said contract between defendant Basich Brothers Construction Company and the United States; that said Duque & Frazzini, although designated as subcontractor in said agreement attached to plaintiff's complaint and marked "Exhibit A," were merely material men and any equipment or labor alleged to have been furnished by any of said use plaintiffs were employed in the fabrication of material before said material was actually installed or became a part of said public improvement.

Wherefore, said defendants pray that plaintiff and said use plaintiffs take nothing as against these defendants or either of them and for their costs of court.

STEPHEN MONTELEONE,

Attorney for Defendants. [34]

State of California,
County of Los Angeles—ss.

N. L. Basich, being first duly sworn, deposes and says: That he is the President of the defendant Basich Brothers Construction Company, a corporation; that he has read the foregoing Answer and knows the contents and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes the same to be true.

N. L. BASICH.

Subscribed and sworn to before me this 5th day of October, 1945.

DOROTHY P. SOETH,
Notary Public in and for Said County and State.
My commission expires February 19, 1946.

Received copy of the within Answer this 10th day of October, 1945.

CLIFFORD R. McFALL,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 28, 1945. [35]

In the District Court of the United States
for the District of Arizona

No. Civil 320—Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK C. HINMAN and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants,

And Third-Party Plaintiffs,

vs.

GLENS FALLS INDEMNITY COMPANY OF
GLENS FALLS, NEW YORK, a corporation,

Third-Party Defendant.

ORDER UPON PRE-TRIAL CONFERENCE,
PURSUANT TO RULE 16

By direction of the Court a pre-trial conference was had in chambers, under and pursuant to Rule 16 of the Rules of Civil Procedure, on the 18th day of February, 1946, at which parties hereto were represented by their respective counsel as follows:

Mr. Clifford R. McFall and Mr. Joseph H. Riley for the plaintiff; Mr. Stephen Monteleone for the defendants and third-party plaintiffs, and Mr. Ralph

W. Bilby and Mr. John E. McCall for the third-party defendant;

As a result of which conference the following actions, amendments and stipulations and agreements were taken and made by the respective parties:

It was stipulated and agreed that Paragraph VII of the plaintiff's complaint be amended by interlineation by changing the word "contractor" in line 10 of said Paragraph to "subcontractor," and that the pleadings of the other parties hereto [36] stand to said complaint as amended;

That the respective amounts of the claims of the use plaintiffs, Bert Turner, Frank C. Hinman and Garland D. England, as set forth in the complaint, are correct, and that the nature of the claims are as stated in the complaint;

That a copy of the original contract referred to in Paragraph I of plaintiff's complaint now offered by plaintiffs and marked Plaintiff's Exhibit "A," may be received and marked in evidence with the same force and effect as though it were the original contract referred to.

That a copy of the Specifications referred to in the contract marked Plaintiff's Exhibit "A," now offered in evidence by the plaintiff and marked Plaintiff's Exhibit "B," may be received and marked in evidence as a part of said Contract, in lieu of the original Specifications, and with the same force and effect as though said specifications were the original above referred to.

That a copy of the Payment Bond referred to in

Paragraph V of the plaintiff's complaint now offered by plaintiff and marked Plaintiff's Exhibit "C," may be admitted and marked in evidence with the same force and effect as though it were the original Bond referred to.

That a copy of the Subcontract Agreement referred to in Paragraph VI of the plaintiff's complaint now offered by plaintiff and marked Plaintiff's Exhibit "D," may be admitted and marked in evidence with the same force and effect as though it were the original Subcontract Agreement above referred to, with the reservation on the part of counsel for the third-party defendant that the same is not material at this time.

That a copy of the Subcontract Bond referred to in Paragraph VII of plaintiff's complaint now offered by plaintiff and marked Plaintiff's Exhibit "E," may be admitted and marked in [37] evidence with the same force and effect as though it were the original Subcontract Bond above referred to, with the reservation on the part of counsel for the third-party defendant that the same is not material at this time.

Certain facts were stipulated, as appears from the Reporter's Transcript as follows:

"Mr. McFall: May it be further stipulated if the Court please, that the work to be done under the subcontract agreement between Basich Brothers and Duque and Frazzini, described in the subcontract as Item 9 Gravel Embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21

rock and Sand for 18"-12" 18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2, are all set forth in the specifications, which are a part of the original contract in evidence in this case on pages 3 and 4 of the specifications, under Schedule of Work Items, and that the specifications and requirements for the doing of that work and the furnishing of that material are set forth in the specifications under the heading, 'Materials,' page III-2-3-4, of the specifications. As to items 9, 11, and 15, as set forth under the heading, 'Materials,' on pages III-2-3-4 of the specifications; and the requirements on the work as to items 21 and 22 are set forth on pages VI-5 of the specifications and that the requirements and specifications for the doing of the work under items 21 and 22 are set forth in the specifications under the heading 4-08, headed, 'Aggregate Grading Requirements,' on page IV-5 of the specifications; and that the requirements and specifications of the work to be done under items 26-a and b, are set forth in the specifications under the heading, 'Binder Course Asphaltic Concrete, Class 1 and Class 2, on pages VI-5 or schedule VI-5 of the specifications.

"Mr. Monteleone: The only exception I take, counsel uses the expression throughout, 'for doing the work.' Those requirements of the specifications are merely the requirements to be complied with in

producing the material to be used on the particular job. Counsel referred to the work in producing that material. I have no objection, but I don't want it to be understood that any work was directly done on the different projects, except as may be inferred from the contract itself." [38]

"Mr. McFall: That is a question of law.

"Mr. Monteleone: I understand that. I want it for the purpose of record. I don't want to prejudice any of my rights, when we say, 'the work to be done.' It is my contention all the way through, whatever work was done by use plaintiffs was work done in producing material, which had to meet the requirements set forth in the specifications. With that understanding, I will so stipulate.

"Mr. McFall: The point of this stipulation, Mr. Monteleone, is that the prime contract required certain materials to be prepared by the contractor according to definite specifications and requirements, and that those requirements are set out in the sub-contract and in the prime contract, in the specifications; and that so far as those items mentioned in the sub-contract are concerned, that Duque and Frazzini did do the work under and pursuant to the requirements of the prime contract.

"Mr. Monteleone: In the requirement of the prime contract, you mean.

"Mr. McFall: That is what I said.

"The Court: Is that stipulated to?

"Mr. Monteleone: Yes, with that understanding I have indicated.

"The Court: You are not objecting to it?

"Mr. Monteleone: No."

It was further stipulated as follows:

That all work done and all labor, materials, supplies and equipment furnished and provided by Andrew Duque and Carson Frazzini, a copartnership doing business under the name of Duque & Frazzini, referred to in Paragraph VI of plaintiff's complaint, in Pima County, Arizona, during the months of March, April, May and June, 1945, was done, performed, provided and/or supplied by said copartnership under the subcontract agreement referred to in said Paragraph VI of the plaintiff's complaint, a copy of which is attached to said complaint and marked Exhibit "B" and for the purposes and uses in said subcontract referred to and for or to no other purpose or use whatsoever.

That all of the work which Duque & Frazzini did pursuant to the Subcontract referred to in the complaint was done on premises [39] belonging to Stefan Gollob located approximately four and one-half miles from the base referred to in the contract as Davis-Monthan Field. That said premises were leased to the defendant, Basich Brothers Construction Co. by Stefan Gollob for the purpose of making available to said Basich Brothers Construction Co. the gravel, rock, and earth on the premises for use upon the work required of the defendant, Basich Brothers Construction Co., under the contract alleged in the complaint, and that the said defendant, Basich Brothers Construction Co., paid all rentals for the use of said premises for said purposes.

That said site was first selected by the United States Engineers before Basich Brothers Construction Co. could acquire the site from the owner for the purposes aforesaid.

That Basich Brothers Construction Co. actually paid for all labor as provided for in the instrument marked "Subcontract Agreement" referred to in the complaint;

That the amount involved in the Subcontract Agreement between Basich Brothers Construction Co., the defendant, and Duque & Frazzini, the subcontractors, exceeded the sum of \$100,000.00.

It was further agreed by respective counsel that the only issue remaining for determination by the Court under the plaintiff's complaint and the defendant's answer thereto is the question as to whether or not Duque & Frazzini were subcontractors within the meaning of the Miller Act, under which this suit is brought.

That subsequent to and during the trial proceedings it was stipulated in effect that Basich Brothers Construction Co. maintained and operated two plants on the Stefan Gollob premises above referred to as being under lease to Basich Brothers Construction Co., in connection with its work under the contract alleged in the complaint, one of which said plants was known as a batch plant and the other as a hot plant.

So Ordered this 4th day of March, 1946.

ALBERT M. SAMES,

District Judge. [40]

[Endorsed]: Filed March 4, 1946. [41]

In the District Court of the United States
for the District of Arizona

No. Civil 320 Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK C. HINMAN and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants,

JUDGMENT

This case came on regularly for trial before the Court sitting without jury on the 18th day of February, 1946. The parties appeared and were represented by their respective counsel as follows:

Mr. Clifford R. McFall and Mr. Joseph H. Riley for the plaintiff, and Mr. Stephen Monteleone for the defendants.

A pre-trial conference was had in chambers on said date under and pursuant to Rule 16 of the Rules of Civil Procedure, and the action, amendments and stipulations and agreements taken and made by the respective parties at said pre-trial conferences were recited in an Order heretofore duly made and entered herein.

On said date the case proceeded to trial and was tried upon the issues raised by plaintiff's complaint

herein and defendant's answer thereto not disposed of by admissions or agreement of counsel at the pre-trial conference, and at the conclusion of the trial the case was orally argued by respective counsel for the plaintiff and defendant and submitted for decision.

Whereupon, after due consideration of the record and the arguments and contentions of the respective parties, the Court on the 4th day of March, 1946, did render judgment in favor of the plaintiffs and against the defendants, Basich Brothers Construction [44] Company, a corporation, and Hartford Accident Indemnity Co., a corporation, as prayed for in plaintiff's complaint herein.

Wherefore, by virtue of the law and by reason of the premises aforesaid, It Is Ordered, Adjudged And Decreed:

That the use plaintiff, Bert Turner, do have and recover of and from the defendants, Basich Brothers Construction Co., a corporation, and Hartford Accident Indemnity Co., a corporation, the sum of \$2,404.63, with interest thereon at the rate of six percent per annum from date hereof until paid;

That the use plaintiff, Frank E. Hinman, do have and recover of and from the defendants, Basich Brothers Construction Co., a corporation, and Hartford Accident & Indemnity Co., a corporation, the sum of \$1,771.00, with interest thereon at the rate of six percent per annum from date hereof until paid;

That the use plaintiff, Garland D. England, do have and recover of and from the defendants, Basich Brothers Construction Co., a corporation, and Hartford Accident & Indemnity Co., a corporation, the sum of \$361.37, with interest thereon at the rate of six percent per annum from date hereof until paid;

And that the said use-plaintiffs recover of and from the said defendants their costs and disbursements incurred in this action amounting to the sum of \$38.96.

The Clerk is directed to enter judgment accordingly.

Done in open court this 20th day of March, 1946.

ALBERT M. SAMES

District Judge

Approved as to form:

STEPHEN MONTELEONE

Attorney for the Defendants

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

To Edward W. Scruggs, Clerk of the Above Entitled Court:

Notice Is Hereby Given that Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Company, a corporation, defendants above named, hereby appeal to the Circuit

Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about March 20, 1946.

Dated: April 10, 1946.

/s/ STEPHEN MONTELEONE

Attorney for Appellants, Basich Brothers Construction Co. and Hartford Accident and Indemnity Company.

[Endorsed]: Filed Apr. 16. 1946. [46]

In the United States District Court
for the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, for the use of Bert Turner, Frank E. Hinman, Garland D. England and Howard K. Cresswell, Plaintiff, vs. Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Company, a corporation, Defendants, numbered Civ-320 Tucson, on the docket of said Court.

I further certify that the attached pages, num-

bered 1 to 59, inclusive, contain a full, true and correct transcript of all the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Amended Designation of Contents of Record on Appeal, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in the City of Tucson, State and District aforesaid, with the exception of the original exhibits referred to therein, pre-trial stipulation, and transcript of all the testimony.

I further certify that the originals of Plaintiff's Exhibits A, B, C, D, and E are transmitted herewith as a part of the Record on Appeal pursuant to Order of the Court dated May 16, 1946.

I further certify that the original Reporter's Transcript of Evidence and Proceedings is transmitted herewith and that the pre-trial stipulation designated by Appellants is contained therein. [60]

I further certify that the Clerk's fee for preparing and certifying to this said Transcript of Record amounts to \$24.20 and that said sum has been paid to me by counsel for the Appellant.

Witness my hand and the seal of said Court this 5th day of June, 1946.

[Seal] /s/ EDWARD W. SCRUGGS,
Clerk.

In the District Court of the United States
for the District of Arizona

Civil—No. 320—Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK C. HINMAN and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants

and Third-Party Plaintiffs,

vs.

GLENS FALLS INDEMNITY COMPANY OF
GLENS FALLS, NEW YORK, a corporation,
Third-Party Defendant.

Before The Honorable Albert M. Sames, Judge.
Tucson, Ariz., February 18, 1946.

TRANSCRIPT OF EVIDENCE AND PROCEEDINGS

Appearances: Mr. Clifford R. McFall and Mr. Joseph Riley, attorneys for plaintiff, United States of America for the use of Bert Turner, Frank C. Hinman and Garland D. England. Mr. Stephen Monteleone, for Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Co., a corporation, defendants. Mr. Ralph W.

Bilby and Mr. John E. McCall, attorneys for Glens Falls Indemnity Co., third-party defendant. [1*]

PRE-TRIAL STIPULATION

Mr. McFall: This is a pre-trial stipulation as to the facts, by and between respective counsel, and perhaps it will be best, Gentlemen, if we enter appearances for the record.

Mr. Monteleone: Stephen Monteleone, for Basich Brothers Construction Company, a corporation, and Hartford Accident and Indemnity Co., a corporation, defendants.

Mr. Bilby: Ralph W. Bilby and John E. McCall, attorneys for Glens Falls Indemnity Company of Glens Falls, New York, a corporation, third-party defendant.

Mr. McFall: Clifford R. McFall and Joseph Riley, attorneys for plaintiff, United States of Americal for the use of Bert Turner, Frank C. Hinman and Garland D. England.

Mr. McFall: You are willing to stipulate that the use plaintiff is entitled to recover against the Hartford Accident and Indemnity Co.?

Mr. Monteleone: That will be all right.

Mr. Bilby: Yes. You do not prejudice yourself one way or the other as against us.

The Court: That takes care, as far as the matter is concerned, against the construction company;

* Page numbering appearing at foot of page of original Reporter's Transcript.

part of the stipulation being that the amount of the claims as set forth by the three use plaintiffs is correct?

Mr. Monteleone: Correct, and the nature of the services, renting of equipment is correct.

Mr. McFall: Your Honor, I have a stipulation here, stated [2] between myself and Mr. Monteleone, which, under paragraph 2 provides; That the plaintiff may amend by interlineation, by changing the word "contractor" in line 10 of paragraph VII, to "sub-contractor."

The Court: Yes, I saw that.

Mr. McFall: May that be agreed to by all counsel?

Mr. Monteleone: No objection.

Mr. Bilby: We have no objection.

Mr. McFall: That it may be stipulated—I presume we should have these instruments marked.

The Court: All right, so you can identify them.

(Instruments marked Plaintiff's Exhibit A and Plaintiff's Exhibit B.)

PLAINTIFF'S EXHIBIT A CONTRACT FOR CONSTRUCTION

Contract No. W-02-353-Eng.-1302

This Contract, entered into this 25th day of January, 1945, by the United States of America (herein-

after called the Government) represented by the Contracting Officer executing this contract, and Basich Brothers Construction Co., a corporation organized and existing under the laws of the State of California, of the city of Alhambra, in the State of California (hereinafter called the Contractor), witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work—The contractor shall furnish the materials, and perform the work (except materials and equipment designated to be furnished by the Government) for constructing taxiways, warm-up and parking aprons, airfield lighting, drainage facilities, and water service lines, together with appurtenant facilities, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, at Davis-Monthan Field, Tucson, Arizona, for the consideration of the schedule of payment hereto attached, and in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Invitation No. 45-79, dated 29 December 1944, Addendum No. 1, dated 4 January 1945, Addendum No. 2, dated 8 January 1945, Addendum No. 3, dated 12 January 1945, Addendum No. 4 dated 13 January 1945, Addendum No. 5, dated 17 January 1945, and drawings as listed therein.

The work shall be commenced on or before 26 January 1945, and shall be completed in accordance with paragraph SC-13 of the specifications.

PLAINTIFF'S EXHIBIT B

Invitation No. 45-79

29 December 1944

War Department

Specifications: For Taxiways, Warm-Up and Parking Aprons, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona.

Appropriation: 212150905 E.S.A., 1942-45.

Part I

STATEMENT OF WORK

1. Location. The building site of the work contemplated under these specifications is located at Davis-Monthan Field, Tucson, Arizona.

2. Work to be done.

(a) The work to be done consists of furnishing all necessary plant, equipment, labor, and materials (except materials and equipment designated to be furnished by the Government), and constructing therewith taxiways, warm-up and parking aprons, airfield lighting, drainage facilities, and water service lines, in accordance with the drawings listed in Part III, "Special Conditions," and with these specifications. The following principal items of work are included.

(1) Preliminary Operations.

(2) Earthwork.

(3) Gravel Base Course.

Exhibit B—(Continued)

- (4) Concrete Work.
- (5) Asphaltic Concrete.
- (6) Marking Taxiways.
- (7) Electrical Work.
- (8) Water Service Lines.
- (9) Drainage Facilities.
- (10) Miscellaneous Work and Job Clean-Up.

(b) Description of Work. All pavements and facilities shall be constructed and equipped in accordance with the detailed specifications and the drawings. In cases of conflict between the specifications and the detailed drawings, the specifications shall govern.

The contractor shall not operate his equipment over any existing mulched area except where absolutely necessary and then only when and where authorized by the Contracting Officer. All existing mulched or otherwise stabilized areas damaged as a result of the contractor's operations under this contract shall be restored by the contractor to their original condition at no cost to the Government.

(c) Sequence of Operations.

(1) General. The contractor will be required to perform construction operations in order of priority listed hereinafter. He shall complete all work in each priority before commencing work on the succeeding

Exhibit B—(Continued)

priority, except with written approval by the Contracting Officer.

(2) Schedule of Priorities.

(a) Priority No. 1 includes the warm-up pads on NW-SE Runway No. 1, fillets and warm-up aprons on N-S Runway No. 2, warm-up apron on east end of E-W Runway No. 3, paving around new hangar, and construction of the extension of Taxiway No. 10 to the Northwest.

(b) Priority No. 2 includes new parking apron adjacent to Runway No. 4, reconstruction of a portion of Taxiway No. 6 and Warm-Up Aprons on North end of Runway No. 4.

(c) Priority No. 3 includes the replacement of existing paving on west end of E-W anchorage.

3. Quantities.

(a) The total estimated quantities necessary to complete the work described in paragraph 2 are as follows:

Exhibit B—(Continued)

SCHEDULE OF WORK ITEMS

Item No.	Series No.	Designation	Approx. Quantity	Unit
1	301	Removal of Asphaltic Concrete Pavement.....	21,500	Sq. Yd.
2	301	Removal of 9-6-9 Portland Cement Concrete Pavement.....	750	Sq. Yd.
3	301	Removal of 36-inch Concrete Pipe.....	320	Lin. Ft.
4	301	Removal of Headwalls	Job	Lump Sum
5	301	Removal of Utilities in "Area m"	Job	Lump Sum
6	301	Removal of Miscellaneous Utilities	Job	Lump Sum
7	302	Clearing and Grubbing	67	Acre
8	339	Excavating and Grading	46,500	Cu. Yd.
9	339	Gravel Embankment	15,300	Cu. Yd.
10	339	Scarifying Native Earth Under Earth Fills or Gravel Embankment	133,900	Sq. Yd.
11	339	Stabilized Subgrade Under Gravel Base Course.....	154,900	Sq. Yd.
12	339	Rolling Subgrade, Earth Fill or Gravel Embankment with Smooth Roller	25,700	Square (100 Sq. Ft.)
13	339	Rolling Subgrade, Earth Fill or Gravel Embankment with Sheep's-Foot Roller	188,100	Square (100 Sq. Ft.)
14	339	Load Testing Stabilized Subgrade	14,000	Square (100 Sq. Ft.)
15	339	Gravel for Base Course	42,530	Cu. Yd.
16	339	Rolling Gravel Base Course with Smooth Roller.....	17,400	Square (100 Sq. Ft.)

Exhibit B—(Continued)

Schedule of Work Items—(Continued)

Item No.	Series No.	Designation	Approx. Quantity	Unit
17	339	Rolling Gravel Base Course with Sheep's-Foot Roller.....	154,800	Square (100 Sq. Ft.)
18	339	Load Testing Gravel Base Course	17,000	Square (100 Sq. Ft.)
19	339	Portland Cement	80,050	Bbl.
20	339	Membrane Curing Solution, Applied	7,200	Gal.
21	339	18-12-18-inch Portland Cement Concrete Airfield Pavement	48,830	Cu. Yd.
22	339	10-inch Portland Cement Concrete Airfield Pavement.....	5,075	Cu. Yd.
23	339	Dowels, Spacer Bars, Dowel Chairs for Types "B", "C", "D", "E-1", and "F" Joints, and Reinforcing Bars.....	180	Ton
24	339	Liquid Asphalt, Grade MC-1, Applied	540	Ton
25	339	85-100 Penetration Paving Asphalt	1,190	Ton
26	339	Asphaltic Concrete	19,810	Ton
27	339	Quick-Setting Emulsified Asphalt, Applied	115	Ton
28	339	Cover Aggregate for Seal-Coat, Applied.....	1,100	Ton
29	339	Painting 6-inch Reflective Type Yellow Taxiway Stripes.....	43	Station (100 Lin. Ft.)
30	339	Installing Delineators	80	Each
31	341	Electrical Work	Job	Lump Sum
32	323	8-inch Flexible Joint, Cast-Iron Water Piping.....	1,000	Lin. Ft.
33	323	6-inch Flexible Joint, Cast-Iron Water Piping.....	678	Lin. Ft.
34	323	8-inch Gate Valve and Type 2 Box	1	Each

Exhibit B—(Continued)

Schedule of Work Items—(Continued)

Item No.	Series No.	Designation	Approx. Quantity	Unit
35	323	6-inch Gate Valve and Type 2 Box.....	10	Each
36	323	Flush-Type Fire Hydrant	9	Each
37	323	Sterilization of Water Lines	Job	Lump Sum
38	305	18-inch Standard Strength Reinforced Concrete Pipe	680	Lin. Ft.
39	305	24-inch Standard Strength Reinforced Concrete Pipe.....	1,466	Lin. Ft.
40	305	30-inch Standard Strength Reinforced Concrete Pipe.....	663	Lin. Ft.
41	305	30-inch Extra Strength Reinforced Concrete Pipe.....	409	Lin. Ft.
42	305	36-inch Standard Strength Reinforced Concrete Pipe.....	615	Lin. Ft.
43	305	48-inch Standard Strength Reinforced Concrete Pipe.....	323	Lin. Ft.
44	305	48-inch Extra Strength Reinforced Concrete Pipe.....	777	Lin. Ft.
45	305	72-inch Standard Strength Reinforced Concrete Pipe.....	1,326	Lin. Ft.
46	305	72-inch Extra Strength Reinforced Concrete Pipe.....	406	Lin. Ft.
47	305	Concrete for Structures, Except in "Area k"	330	Cu. Yd.
48	305	Steel Reinforcement for Structures	4	Ton
49	305	Frames and Covers for Drainage, Structures, Except in "Area k"	19	Ton
50	305	Drainage Ditch Excavation	27,000	Cu. Yd.
51	305	Grader Ditches	960	Lin. Ft.
52	305	Interceptor Dyke Embankment	25,000	Cu. Yd.

Exhibit B—(Continued)

Schedule of Work Items—(Continued)

Item No.	Series No.	Designation	Approx. Quantity	Unit
53	305	Interceptor Ditch Excavation	26,800	Cu. Yd.
54	312	Reconstruction of Miscellaneous Structures in "Area k" Alternatives for Items Nos. 45, 46, 47, 48, 50, 52, and 53. (To be used in case Alternate Construction shown on Drawing File No. 1059/98 and noted on Drawings File Nos. 1059/46 and 47 is accepted.)	Job	Lump Sum
55	305	72-inch Standard Strength Reinforced Concrete Pipe.....	1,990	Lin. Ft.
56	305	72-inch Extra Strength Reinforced Concrete Pipe.....	610	Lin. Ft.
57	305	Concrete for Structures, Except in "Area k"	350	Cu. Yd.
58	305	Steel Reinforcement for Structures.....	4.5	Ton
59	305	Drainage Ditch Excavation	47,000	Cu. Yd.

(b) The above estimate is approximate and is given only to provide a basis for determining the amount of the consideration of the contract. Within the limit of available funds, the contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 2 hereof, be it more or less the amounts estimated above.

Exhibit B—(Continued)

4.08. Aggregate Grading Requirements:

PERCENT PASSING

Sieve Size	Primary Aggregate Sizes			Combined Course Aggregate			Combined Total Aggregate		
	1½"	¾"	No. 4	Sand	No. 4	No. 4	3"	1½"	¾"
	3"	1½"	¾"		3"	1½"	Max.	Max.	Max.
3"	100				100		100		
2½"	90-100				97-100		97-100		
1½"	0-10	90-100			50-70	95-100	67-79	96-100	
1"		0-10	90-100		22-40	35-55	43-58	58-74	95-100
¾"			20-45		6-16	10-22	30-44	40-55	55-71
No. 4			0-10		0-3	0-5	24-37	30-44	38-53
No. 8				95-100	75-90		20-32	25-38	31-45
No. 16				55-75			15-25	19-30	24-36
No. 30				30-55			9-17	11-20	15-25
No. 50				10-25			3-9	4-11	5-13
No. 100				2-8			0-3	0-4	0-5

Exhibit B—(Continued)

6-06. Bituminous Mixtures.

(a) Composition of Mixture. The mineral aggregate for the three classes of asphaltic concrete mixtures shall be of such grading that the respective percentages by weight as determined by laboratory sieves will conform to the gradations set forth hereinafter:

(1) Binder Course Asphaltic Concrete (Class 1)

Sieve Size	Percentage Passing Sieve Square Openings
1½ inch	100
1 inch	70 - 90
¾ inch	52 - 75
⅜ inch	32-- 52
No. 4 sieve	22 - 36
No. 10 sieve	16 - 26
No. 40 sieve	1 - 13
No. 80 sieve	3 - 8
No. 200 sieve	1 - 4
Percent by weight 85-100 penetra- tion asphalt (to be added to the aggregate	4.5 - 6.5

(2) Wearing Course Asphaltic Concrete (Class 2)

Sieve Size	Percentage Passing	
	1	2
¾ inch	100	100
1½ inch	76 -100	84 -100
⅜ inch	59 - 71	71 - 84
No. 4 sieve	35 - 54	54 - 73
No. 10 sieve	24 - 42	42 - 60
No. 40 sieve	10 - 23	23 - 36
No. 80 sieve	6 - 15	13 - 23
No. 200 sieve	3 - 8	4 - 9
Percent by weight 85-100 penetra- tion asphalt (to be added to the aggregate)	3.5 - 5.5	4 - 6

Exhibit B—(Continued)

(3) Wearing Course Asphaltic Concrete, Fine Grading (Class 3)

Sieve Size	Percentage Passing
$\frac{3}{8}$ inch	100
No. 4 sieve	65 - 80
No. 10 sieve	45 - 60
No. 40 sieve	25 - 55
No. 80 sieve	15 - 25
No. 200 sieve	5 - 9
Percentage by weight 85-100 penetration asphalt (to be added to the aggregate)	5.0 - 7.0

(c) Job Mix Formula. The contractor shall submit in writing the single definite percentage for each sieve fraction of aggregate, within the limits shown in subparagraph (a), which he chooses as a fixed mean in each instance, the percentage of paving asphalt for the mixture, and also the intended temperature of the completed mixture at the time it is discharged from the mixer. No work shall be started on the project nor any mixture accepted therefor until the contractor has submitted and received approval for his intended job mix formula. The job mix formula will be allowed the following tolerances:

Aggregate passing sieves No. 4 or larger.....	5%
Aggregate passing No. 10, No. 40, and No. 80 sieves	4%
Aggregate passing No. 200 sieve.....	2%
Asphalt	0.5%
Temperature of mixing	25°F.

The percentage of asphalt and gradation of aggregate, in the job mix formula, may be changed to meet specific field conditions without adjustment in contract costs, as directed by the Contracting Officer.

Mr. McFall: That the instrument marked Plaintiff's Exhibit A is the copy of the original contract referred to in paragraph I of the complaint, between Basich Brothers Construction Company and the United States of America, for the doing of the work described in the complaint, at Davis-Monthan Field, Tucson, Arizona; that this copy may be substituted and admitted in evidence in lieu of the original contract, in the same force and effect as though it is the same contract, subject, of course, to any errors which may appear, if there are any.

Mr. Monteleone: May I make this suggestion. Is it agreeable that the contract be marked for identification, with the understanding that counsel for any of the parties may read such portions of the contract which they may deem material to [3] the issues. In other words, there are a lot of foreign matter in the contract.

Mr. McFall: I don't see any objection to putting in the contract, Your Honor. I think we have alleged it. It is admitted and I have it.

The Court: The contract will come in in the course of the trial anyway.

Mr. McFall: We have no objection to the admission of the contract alleged in the complaint. Whatever is material to this case, we can point that out, but I think the whole contract should be in.

Mr. Monteleone: All right.

Mr. McFall: Plaintiff's Exhibit B, which are the

specifications referred to in the contract, marked Plaintiff's Exhibit A, and of course which are a part of the contract, which I also wish to offer in evidence in lieu of the original specifications, which I have here, which Mr. Monteleone brought over, with the understanding that Plaintiff's Exhibit B, being a copy, may be used and admitted in evidence to the same force and effect as though it were the original.

Mr. Monteleone: May this be understood. I don't know what the outcome of this case will be, nor does any other counsel; but if any of the parties become dissatisfied, Your Honor can visualize the size of the transcript, and in such event counsel can agree to the material portions and all other matters may be considered out of the record.

The Court: The portions that you want. [4]

Mr. McFall: You can only put in those things that are on appeal. But I think we should have the entire contract; while I certainly don't intend to refer to all of it, I think it should be in evidence.

The Court: Will you stipulate that?

Mr. Monteleone: I will stipulate that.

Mr. McFall: Further stipulate that the plans, which are also mentioned in the contract, and which I do not have, are not material to the consideration of this controversy, but only the detail drawings of the runways and things, which at the present time are not necessary to the determination of this case and none of those matters being in issue here and

for that reason may be omitted from the record. That the payment bond referred to, a copy of which I have in my hand, referred to in paragraph V of the complaint, may be admitted in evidence as part of this stipulation, marked Plaintiff's Exhibit C.

Mr. Monteleone: No objection.

(Such instrument being marked Plaintiff's Exhibit C.)

(Plaintiff's Exhibit C is similar to Exhibit "A" attached to Complaint and set out in full at pages 11, 12 and 13 of this Record.)

Mr. McFall: That the sub-contract agreement referred to in paragraph VI of the complaint, and a copy of which is attached to the complaint, may be admitted in evidence as a part of this stipulation, a copy of which sub-contract agreement I have in my hand, and may be marked Plaintiff's Exhibit D.

Mr. Monteleone: No objection. May it be understood by the third party defendant that these copies introduced by Mr. [5] McFall at the present time will be introduced in our matter as exhibits?

Mr. Bilby: If it becomes material, is that right, Mr. McCall?

Mr. McCall: That is right, if it becomes material.

Mr. McFall: That the sub-contract bond referred to in paragraph VII of plaintiff's complaint, and made a part of the complaint as Exhibit C, may be admitted in evidence under this stipulation and marked Plaintiff's Exhibit E.

(Said instruments being marked Plaintiff's Exhibit D and Plaintiff's Exhibit E.)

(Plaintiff's Exhibit D is similar to Exhibit "B" of Complaint and set out in full at pages 13 to 27, inc., of this Record.)

Plaintiff's Exhibit E is similar to Exhibit "C" of Complaint and set out in full at pages 28 to 31, inc., of this Record.)

Mr. Monteleone: No objection, with the same stipulation with third party defendant.

Mr. McFall: May it be further stipulated, if the Court please, that the work to be done under the sub-contract agreement between Basich Brothers and Duque and Frazzini, described in the sub-contract as Item 9 Gravel Embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18" - 12" - 18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2, are all set forth in the specifications, which are a part of the original contract in evidence in this case on pages 3 and 4 of the specifications, under Schedule of [6] Work Items, and that the specifications and requirements for the doing of that work and the furnishing of that material are set forth in the specifications under the heading,

"Materials," page III-2-3-4, of the specifications. As to items 9, 11, and 15, are set forth under the heading, "Materials," on pages III-2-3-4 of the specifications; and the requirements on the work as to items 21 and 22 are set forth on pages VI-5 of the specifications and that the requirements and specifications for the doing of the work under items 21 and 22 are set forth in the specifications under the heading 4-08, headed, "Aggregate Grading Requirements," on page IV-5 of the specifications; and that the requirements and specifications of the work to be done under items 26-a and b, are set forth in the specifications under the heading, "Binder Course Asphaltic Concrete, Class 1 and Class 2," on pages VI-5, or schedule VI-5 of the specifications.

Mr. Monteleone: The only exception I take, counsel uses the expression throughout, "for doing the work." Those requirements of the specifications are merely the requirements to be complied with in producing the material to be used on the particular job. Counsel referred to the work in producing that material. I have no objection, but I don't want it to be understood that any work was directly done on the different projects, except as may be inferred from the contract itself.

Mr. McFall: That is a question of law.

Mr. Monteleone: I understand that. I want it for the purpose of record. I don't want to prejudice any of my rights, [7] when we say, "the work to be done." It is my contention all the way through, whatever work was done by use plaintiffs was work

done in producing material, which had to meet the requirements set forth in the specifications. With that understanding, I will so stipulate.

Mr. McFall: The point of this stipulation, Mr. Monteleone, is that the prime contract required certain materials to be prepared by the contractor according to definite specifications and requirements, and that those requirements are set out in the sub-contract and in the prime contract, in the specifications; and that so far as those items mentioned in the sub-contract are concerned, that Duque and Frazzini did do the work under and pursuant to the requirements of the prime contract.

Mr. Monteleone: In the requirement of the prime contract, you mean.

Mr. McFall: That is what I said.

The Court: Is that stipulated to?

Mr. Monteleone: Yes, with that understanding I have indicated.

The Court: You are not objecting to it?

Mr. Monteleone: No.

Mr. McFall: We already have a stipulation which I will read into this record. This is contained in paragraph 3 of the stipulation between myself and Mr. Monteleone, filed February 15, 1946, as follows: That all work done and all labor, materials, supplies and equipment furnished and provided by Andrew Duque and Carson Frazzini, a copartnership doing business [8] under the name of

Duque & Frazzini, referred to in Paragraph VI of plaintiff's complaint, in Pima County, Arizona, during the months of March, April, May and June, 1945, was done, performed, provided and/or supplied by said copartnership under the sub-contract agreement referred to in said Paragraph VI of plaintiff's complaint, a copy of which is attached to said complaint and marked Exhibit B and for the purposes and uses in said sub-contract referred to and for or to no other purpose or use whatsoever.

Mr. Monteleone: I have the assurance of counsel that is a true fact. I so stipulate. I don't think counsel will have any objection to that stipulation. That is an established fact.

Mr. McFall: It is stipulated also, as I understand it—I am trying to follow my complaint through here, your Honor—that the statement of the claim of Bert Turner, set forth in paragraph VIII of the complaint, for the sum, total sum of \$2404.63, is a correct statement of the amount of his charge for rental of his trucks to Duque and Frazzini, as alleged in paragraph VIII of the complaint; and that that equipment was used by Duque & Frazzini in the work required by and under said sub-contract agreement.

Mr. Monteleone: We so agree. That is admitted in the pleading.

Mr. McFall: All except the amount.

Mr. Monteleone: We have agreed previously as to the amount.

Mr. McFall: I just wanted to get it definite. Then the [9] same stipulation may be made and understood in regard to the use plaintiff Frank E. Hinman; that the correct amount of his claim is \$1771, otherwise the same stipulation can be made regarding him, as regarding the character of the services, as was made in the case of Bert Turner; that the amount of the claim of Garland D. England, in the sum of \$361.37, is a correct statement of the amount of work, equipment, labor, or material which he furnished to Duque & Frazzini, and that consisted of truck rental, and that they were used for the same purposes and same reasons I have heretofore stipulated.

May it further be stipulated that all of the work which Duque & Frazzini did pursuant to the subcontract was done upon the premises, in the vicinity of the base referred to as Davis-Monthan Field.

Mr. Monteleone: Approximately $4\frac{1}{2}$ miles from the base.

Mr. McFall: Approximately $4\frac{1}{2}$ miles from the base. These premises, the lease of the premises was from Stefan Gollub, and that Stefan Gollub leased said premises for the purpose of making available to Basich Brothers the gravel, rock and earth on the premises, for use upon the work required by this company on Davis-Monthan Field; and that Basich Brothers paid Stefan Gollub, the lessor, rental for the said premises.

Mr. Monteleone: That is indicated in the con-

tract. But I want to add a further stipulation, that the site from which the material was to have been produced was first selected by the U. S. Engineer, who had to make a test. In other words, the material had to be available to the job and it had to meet the [10] requirements of the U. S. Engineer Department before Basich Brothers could acquire the site from the owner. Is that understood?

Mr. McFall: That is understood, but that the premises were the leased premises of Basich Brothers. I mean, it was under lease to Basich Brothers and that Duque & Frazzini were merely there on Basich Brothers' premises in doing his work.

Mr. Monteleone: That is correct. That is indicated in the contract.

Mr. McFall: May it further be stipulated, in accordance with the sub-contract, attached to the contract, that Basich Brothers actually paid all of the labor, all of Duque & Frazzini's labor which was done in performance of the work designated by them.

Mr. Monteleone: It will be stipulated that Basich Brothers made payments, labor payments, as provided for in the instrument designated as a sub-contract, between Duque & Frazzini and Basich Brothers Construction Company.

Mr. McFall: That the defendant, Basich Brothers, at all times had their General Superintendent upon the premises and being operated by Duque & Frazzini.

Mr. Monteleone: No, I understand that is not a fact, that they had gone there on occasion, but——

Mr. McFall: Furthermore, on occasion they gave directions as to how the work should be done and when it should be done.

Mr. Monteleone: No, that is not a fact, as I understand it. [11]

Mr. McFall: Furthermore, that Basich Brothers at all times held out Duque & Frazzini not only to these plaintiffs, but to the public as sub-contractors.

Mr. Monteleone: That is not stipulated to.

Mr. McFall: That is all, I think all right now.

The Court: Is that all in connection with the stipulation? Is there anything else to be incorporated in the stipulation?

Mr. McFall: I will have to put on evidence as to matters on which we disagree. Practically all of these matters are admitted, but those are all of the facts which we will require to present to the Court.

The Court: Is there any further stipulation that counsel want to make?

Mr. Monteleone: I am afraid, as far as third party plaintiffs are concerned, we will have to fight it out.

The Court: That is about the attitude of counsel for Glens Falls Indemnity Company?

Mr. Bilby: That is right. I don't know what

we can stipulate. If Mr. McFall wanted to stipulate to any judgment, we would not question the amount.

Mr. McFall: Will it be further stipulated that the amount involved in the Duque & Frazzini sub-contract exceeded \$100,000?

Mr. Monteleone: That is correct.

Mr. Bilby: So to make it come under the Miller Act?

Mr. McFall: No, it goes to the question of estoppel. [12] They have pleaded that in the motion and I say therefore, they are estopped to deny they are sub-contractors.

Mr. Monteleone: When I stipulate to the amount, if the Court please, the quantities and the prices set forth in the contract, I think that it exceeds counsel when he says I stipulate the amount set forth in the contract itself.

The Court: So there is no occasion for further stipulation. All right, shall we go out and go ahead with the case. There are no other stipulations now between counsel?

Mr. Monteleone: Except, counsel, as I understand, will you stipulate as to certain letters sent to the Glens Falls Indemnity Company?

Mr. Bilby: I think the simplest way to handle that will be to present them to us.

Mr. McCall: Each one as it comes up.

Mr. McFall: There is one other matter here, if

the Court please, that I would like to submit to counsel in the form of a stipulation and it pertains to the claim of Howard Cressell. I submitted a stipulation to Mr. Cressell, whom I represented all along, but he didn't get it in time. I filed the original complaint; it is exactly identical in substance and effect, for the claims for truck rental, which are already in the case. I have prepared an amendment, and we wondered if counsel would permit me to include that my claims be amended at this time and stipulate the correctness of it, the same stipulation as to the other claimants, so that I won't have to file a separate [13] suit for Mr. Cressell later on.

Mr. Monteleone: I explained my position to counsel previously, if the Court please, and I talked to Mr. McCall, and I couldn't get a satisfactory stipulation which would justify me to enter into a written stipulation; and at this time I feel somewhat reluctant to enter into a stipulation. But after this case is determined we may come to some satisfactory arrangement, but in view of the attitude for third party plaintiffs, I wouldn't want to do it.

Mr. McFall: Very well, your Honor.

The Court: Very well, we will proceed.

(Parties and counsel adjourn to court room.)

The Court: You have some further testimony you desire to present at this time, Mr. McFall?

Mr. McFall: Yes. Mr. Hampton.

CLARENCE HAMPTON,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. McFall:

Q. Will you talk loud enough so His Honor can hear this. What is your name?

A. Clarence Hampton.

Q. Do you live in Arizona? A. I do. [14]

Q. Where?

A. Gila Bend is my home address.

Q. What is your business?

A. I am what is termed at the pit as a crusher operator, or pit foreman, or superintendent of pits and dirt production.

Q. Were you employed in June to do that work here by Duque & Frazzini, in connection with what is known in this case as Davis-Monthan Field job?

A. I was.

Q. And you worked for Duque & Frazzini, did you? A. Yes.

Q. Where did you work, out Stefan Gollub's place? A. That is right.

Q. What was your position with Duque & Frazzini? A. I didn't get that.

Q. What was your position on that job?

A. My position there was general superintendent of the pit and production of the materials.

Q. You were Duque and Frazzini's general superintendent? A. That is right.

(Testimony of Clarence Hampton.)

Q. Were you there from the beginning of the job to the end of it, so far as Duque & Frazzini's part of it was concerned? A. That is right.

Q. That took in April, May and part of June, 1945? A. That is right.

Q. I ask you whether or not Basich Brothers Construction [15] Company had anyone on that job at the particular place where you were working?

Mr. Monteleone: I object to that, unless this man knows who the party was and whether he was authorized by the corporation. This is a corporation, authorized to be on the job. I don't think this man is in a position to testify to that fact.

Mr. McFall: I can't show it all at once, your Honor.

The Court: Proceed.

Mr. McFall: Q. Did you know the superintendent of Basich Brothers Construction Company?

A. I did.

Q. What was his name?

A. George Covicks. That is the way I would pronounce it.

Q. Was he out there during the course of this work? A. He was.

Q. Was he acting at all times as superintendent of Basich Brothers Construction Company?

Mr. Monteleone: I object to that. This man is not qualified to answer that question.

Mr. McFall: He can state that he did so act, your Honor, as superintendent of the job.

(Testimony of Clarence Hampton.)

The Court: The witness may answer the question. Go ahead.

A. He did.

Q. (By Mr. McFall): Did he give you, or the men working for Duque & Frazzini, orders as to how the work should be done [16] on occasions there?

A. There was one time on a controversy that he did override me on Duque & Frazzini's orders.

Q. When was that?

A. That was on a Saturday noon, that I had instructions to close the plants down, and I did so.

Q. On a Saturday afternoon?

A. On Saturday at 11 o'clock to be exact, and the reason for that——

Mr. Monteleone: I object to what the reason was.

The Court: Just answer the question.

Mr. McFall: Q. Go ahead, you ordered the plant closed. What did he do?

A. He came down to another representative that I had, notifying him, and authorized the work to go ahead; and I told him at the time that I had instructions, as far as Duque & Frazzini were concerned that I would be liable for that, and he gave the remark that the job had to go on.

Q. Did it go on?

A. It went on the rest of that shift.

Q. Did you stay there and superintend it?

A. I did not.

Q. Did he? A. I suppose he did.

(Testimony of Clarence Hampton.)

Q. How often did you see him around there on this work? Was he there every day?

A. I don't suppose there was a day that he wasn't there [17] during the day and more sometimes.

Q. What did he do?

A. He acted as general superintendent, I would consider the man, in seeing that the job was being done.

Q. Did he inspect the work?

A. To an extent, yes. The government had other inspectors there, as far as inspectors were concerned, but he was in general supervision of it, I would term the man, and regarded him that way.

Q. This material that was produced by Duque & Frazzini there on Stefan Gollub's place, was all delivered to Basich Brothers, Mr. Hampton, by Duque & Frazzini? A. Yes, sir.

Q. They sent their truckers there to get the material as it was produced? A. They did.

Q. Basich Brothers also paid all of his common labor?

Mr. Monteleone: Just a minute. I object to that, if the Court please, whether Basich Brothers paid the account, unless the man knows.

Mr. McFall: I didn't say the account.

Mr. Monteleone: What?

Mr. McFall: I said the common labor.

Mr. Monteleone: I object unless he knows.

Mr. McFall: Q. Do you know whether or not the labor under your charge and supervision re-

ceived their weekly [18] payments from Duque & Frazzini or Basich Brothers?

Mr. Monteleone: The contract speaks for itself. The contract makes certain provision as to what Basich Brothers should do, and one of those provisions is they should pay the labor bill.

Mr. McFall: We want to show they did.

The Court: Objection overruled. Answer the question.

The Witness: Answer the question?

Mr. McFall: Yes.

A. They did.

Mr. McFall: I think that is all.

Cross Examination

By Mr. Monteleone:

Q. Did you know Mr. Williams on that job?

A. I did.

Q. On this date you say Duque & Frazzini shut down the plant, that was sometime in June, wasn't it?

A. No, sir. It was getting along toward the last of their job. I disrecall the date.

Q. At that time, Mr. Williams was along also, wasn't he?

A. I don't believe he was at just the time.

Q. Did he come there later on?

A. There was a probability he did.

Q. At that time, Mr. Williams instructed you that the work must progress in order that it wouldn't hinder the operations at the Base? [19]

A. Not to me directly.

(Testimony of Clarence Hampton.)

Q. Did you hear him say that to Duque & Frazzini? A. I did not.

Q. But you were told not to close down that plant, weren't you?

A. Just that the plant was going to operate.

Q. What was that?

A. Mr. Covick said the plant was going to operate.

Q. In other words, he told you if it didn't operate he would have to suspend operations at the main base?

A. He didn't go into detail with me.

Q. That was the only occasion he told you about continuing with your operation, isn't that so?

A. That one time.

Q. As a matter of fact, when Mr. Williams came over to the job, the U. S. engineer came over to the particular job where you were working, he was concerned about the quality of the material that Duque & Frazzini were producing, isn't that true?

A. To some extent.

Q. Yes, and whatever complaint was made by Mr. Williams, U. S. engineer on the job, was the fact that some of the materials weren't complying with government specifications, isn't that true?

A. He claimed so, but he shouldn't have accepted it if he didn't want it.

Q. But that was his main objection, that the material wasn't coming up to specifications?

A. I don't think so, your Honor. [20]

(Testimony of Clarence Hampton.)

Q. When Mr. Williams came over there what did he complain about?

A. The only complaint I heard was completing the job. The quality of the material wasn't brought into question so much.

Q. In other words, the job was being somewhat delayed wasn't it? A. That is right.

Q. That was the only complaint that was made by Covick or the only complaint made by Mr. Williams, was to complete that job, isn't that true?

A. That is right.

Q. That was the only directions given to you by either of these parties, was to complete this job?

A. That is right.

Q. Because the government was aiming to get that bomber base completed as soon as possible, isn't that true? A. That is right.

Q. Now all of the material that Duque & Frazzini were producing at this particular pit either was placed at stock pile and then dumped in trucks, isn't that true, and hauled to the main base?

A. That is right.

Q. And that main base was located about 4½ miles from that pit, isn't that true?

A. Presumably so.

Q. You were getting all of your directions from Duque & [21] Frazzini in producing the material?

A. That is right.

Q. You were producing gravel, rock and sand?

A. That is right.

Q. And the gravel, rock and sand produced by

(Testimony of Clarence Hampton.)

Duque & Frazzini had to come up to certain specifications by the government, isn't that true?

A. That is right.

Mr. Monteleone: That is all.

Redirect Examination

By Mr. McFall:

Q. But Covick did direct your men to proceed with the work on that Saturday afternoon, and they did so, is that right? A. That is right.

Mr. McFall: That is all.

LEE WARD,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. McFall:

Q. Where do you live, Mr. Ward?

A. 30th and Park.

Q. Tucson, Arizona? A. Yes, sir. [22]

Q. How long have you lived here?

A. Since last March.

Q. Did you work here in connection with the contract known as Duque & Frazzini contract with Basich Brothers? A. Yes, sir.

Q. What was the nature of your work there?

A. Crusher operator, mechanical work.

Q. How long have you been in that work, Mr. Ward? A. 30 years.

(Testimony of Lee Ward.)

Q. Who were you working for before you went to work on this job here?

A. Basich Brothers.

Q. How-long had you been working for Basich Brothers? A. About two years.

Q. Where did you live before you came here for this job?

A. I was in the northern part of the state, Flagstaff. We finished a job at Flagstaff.

Q. Basich Brothers' job there?

A. Yes, sir.

Q. Where did you live at that time?

A. My headquarters was always in Flagstaff, but I worked different times in California and Nevada.

Q. Who directed you to come down here?

A. Basich Brothers' superintendent.

Q. Did they pay you while you were here?

A. Sure. [23]

Q. And you were operating a Duque & Frazzini crusher?

A. It was Basich Brothers' crusher, they rented it and I worked for them.

Q. When did you quit working here for Duque & Frazzini?

A. I don't know just exactly what time it was; whenever they pulled out.

Q. June?

A. Something like that, I don't know.

Q. Did you continue working for Basich Brothers? A. I did.

(Testimony of Lee Ward.)

Q. How long?

A. Until they finished the job and we moved the stuff away.

Q. When was that?

A. October 8th, when I sat out the last load.

Q. In other words, you were working for Basich Brothers before you came down here?

A. Sure.

Q. They paid you while you were here to operate this crusher for Duque & Frazzini?

A. That is right.

Q. And you continued working for them after Duque & Frazzini left?

A. That is right.

Mr. McFall: That is all.

Cross Examination

By Mr. Monteleone:

Q. You were to get your directions from the gentleman, [24] Mr. Hampton?

A. I got them from Hampton and Duque & Frazzini.

Q. And you were operating a crusher Duque & Frazzini were renting from Basich Brothers?

A. That is right.

Mr. Monteleone: That is all.

BERT TURNER,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. McFall:

Q. Please state your name.

A. Bert Turner.

Q. Are you one of the claimants in the case on trial?

A. Yes, sir.

Q. And you have a claim here in this case for the sum of \$2400?

A. Yes, sir.

Q. And consists—I believe it has been stipulated—of rental of your trucks to Duque & Frazzini on the Davis-Monthan job?

A. Yes, sir.

Q. Mr. Turner, I will ask you whether or not you knew the relationship of Duque & Frazzini with Basich Brothers at the time you entered into this agreement with Duque & Frazzini? [25]

A. They both told me they were sub-contractors of Basich Brothers.

Q. Who do you mean by both?

A. Duque and Mr. Frazzini.

Mr. Monteleone: If the Court please, I move that the answer be stricken out as hearsay, as far as Basich Brothers is concerned.

Mr. McFall: I don't believe so, your Honor. It goes to a question of estoppel. Basich Brothers, by the very terms of their contract, say they are sub-contracting this work. The public generally understood they were sub-contractors; this man so understood. Now they want to come in and say they weren't sub-contractors. They want to say something else. I think that is the purpose of this testimony, to show this man, in the contracting of

(Testimony of Bert Turner.)

this job, by virtue of the Miller Act; and by virtue of the Act they were sub-contractors.

Mr. Monteleone: Are you trying to hold Basich Brothers liable here under the Miller Act, Mr. McFall?

The Court: He may answer.

Mr. Monteleone: I note an exception, if the Court please.

Q. (Mr. McFall): It is notoriously understood they are sub-contractors of Basich Brothers?

Mr. Monteleone: I object to the question, "they are notoriously known——"

The Court: Answer the question.

A. Absolutely was. I wouldn't work for an outfit I didn't [26] know they were bonded and had a sub-contract of that kind. They both told me they were sub-contractors of Basich Brothers.

Cross Examination

By Mr. Monteleone:

Q. When you say they both, you are talking about Duque & Frazzini?

A. That is right.

Redirect Examination

By Mr. McFall:

Q. They told you they had a sub-contract with Basich Brothers? A. Yes, sir, they did.

Mr. McFall: I think that is all I have, your Honor. I submit the plaintiff's case on that testimony.

(Testimony of Bert Turner.)

The Court: Does counsel desire to submit some testimony at this time?

Mr. Monteleone: Not as far as use plaintiff's case is concerned. As I indicated to the Court, these facts are preliminarily agreed upon. It is a legal question, nothing more or less. I don't desire to introduce any evidence, but I do desire to argue the matter, cite some authorities for the Court in connection with the legal matter.

The Court: I think it would be wise to submit that matter at this time.

(Arguments.) [27]

Mr. McFall: If the Court please, in the pre-trial conference this morning I am not sure whether this complaint was put into the record or not, but at any rate, I overlooked the matter if it was not, and if it is not I desire at this time to offer the complaint filed, the verified complaint filed by Basich Brothers Construction Company, by N. L. Basich, president, in the U. S. District Court for the District of California, which is a suit by them against Glens Falls, on this identical sub-contract and sub-contract bond, for the purpose of showing the construction placed on this contract by this defendant in that action as plaintiff; and if the Court will examine it, particularly the paragraphs which I can point out to you, I think the materiality of it—

Mr. Monteleone: Counsel, I am not going to stipulate the complaint is material to any of the issues involved here, except the Court may con-

(Testimony of Bert Turner.)

sider any allegations in the complaint as admissions or statements——

The Court: That is the purpose of the statement by the defendant; for no other reason. That action is entirely different from this action here. In that action the construction company is suing Glens Falls directly for a loss which they directly sustain.

Mr. McFall: The suit is upon this sub-contract, and——

The Court: You mean Duque & Frazzini?

Mr. McFall: Yes, your Honor. This is a suit against Duque & Frazzini and their bondsmen on this contract, showing [28] beyond any shadow of a doubt that this party, Basich, regards this as a sub-contract in that suit over there, and alleges that the material was furnished by and work was done in this prime contract by Duque & Frazzini. I should like to offer it for that purpose, and refer to it in my argument.

The Court: And you want it limited to what, Mr. Counsel?

Mr. Monteleone: I will not agree that that complaint is material to the issues involved in this matter. The only purpose it may serve—I don't see how it can change the terms of the contract itself. If the parties refer to the contract as a sub-contract, that doesn't place the construction that the Court is called upon to place on it. What the defendant may have called that after this litigation took place is not going to add to or detract

(Testimony of Bert Turner.)

from the words or provisions of the contract itself. In other words, the Court is bound not by what the parties may call the instrument, but by what interpretation the Court places on the instrument itself. I understand counsel's purpose in introducing it is merely to indicate what the defendant, Basich Brothers, call that in their complaint, the contract referred to as a sub-contract. For that purpose alone I have no objection.

The Court: Well, I noticed this morning in your discussion of the McAvoy case, to the relationship that the statutes recognize between these parties. I suppose you are offering this complaint now as to what bearing it may have in that relationship. [29]

Mr. McFall: Yes, your Honor. Not only do they call them a sub-contractor, but they go farther than that, which coincides with our theory that it wasn't a contract to furnish material, but to do work; and that is what they say all through this complaint here. I do not think they can go into one court and say that, and come into another court and say it is only a material man's contract.

The Court: The ruling will be that it is admitted. It is up to the Court to fix the limitations as to how far it should be considered in any issues in this case.

The Clerk: Plaintiff's Exhibit F in the record.

(Arguments.)

Mr. McFall: May I address the Court and Counsel in regard to one matter in the stipulation. My attention was called to it by Mr. Monteleone's

last argument. I ask now if counsel for Basich Brothers Construction Company, and Hartford Accident and Indemnity Company, will stipulate that it is a fact that Basich Brothers were operating plants on the Gollub premises at or near the plants operated by Duque & Frazzini in preparing the material to be put on the Base, to-wit, a batch plant and a hot plant, one for the preparation of Portland cement base and the other for asphalt concrete?

Mr. Monteleone: We are getting into a new issue.

Mr. McFall: No, we are not. He has brought out the question that this is four and one-half miles from the Base and how could they be working on the Base when it was four [30] and one-half miles away. We were attempting to show that Basich's superintendent was there all the time. The truth of the matter is, they were operating plants there side by side on this plot of ground they had leased. They were making some of this material they were putting in those very plants; they were operating it side by side. Counsel contends that Basich Brothers weren't doing work on that material, because he was four and one-half miles from the Base. That is the argument he makes about us. We want to show that Basich was operating there alongside us, in this same pit, making this stuff, cement and asphalt, to be put on the base. He was accepting some delivery of our material right there on the Gollub premises.

The Court: The plaintiffs were using Duque &

Frazzini's teams and equipment, trucks, so many days—but at that point, the materials were being prepared and produced for utilizing by Duque & Frazzini?

Mr. McFall: Yes. And right there at the same place, Basich Brothers were conducting the same operation as part of their work under this prime contract, right there beside us on the Gollub property. They say this isn't true, that all this material was delivered at stock pile. It was done right there by Basich, not by us, but by Basich Brothers.

Mr. Monteleone: I don't see where that has any materiality, if the Court please.

Mr. McFall: It is in answer to his argument that because the plant was four and one-half miles away we couldn't [31] do the work. If he could do the work there, we could do it there. Certainly he wasn't furnishing the material.

Mr. Monteleone: I won't stipulate to that.

Mr. McFall: Very well, I want to call one witness.

The Court: All right.

Mr. Monteleone: If the Court please, Mr. Basich states that they had an asphalt plant nearby, and that they did take material that was in stock pile, that was produced by Duque & Frazzini and haul it to their asphalt plant and use some of the material in the asphalt plant and batch plant for concrete.

Mr. McFall: There was a batch plant and hot plant.

Mr. Monteleone: That is right.

(Testimony of Bert Turner.)

Mr. McFall: Operated there on the Gollub premises by Basich Brothers.

Mr. Monteleone: That is right. That had nothing to do with the Duque & Frazzini job, except the material produced, some was hauled to be converted to another kind of material.

Mr. McFall: Yes. [32]

United States of America,
State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I was duly sworn as official court reporter in the foregoing entitled cause. That as such official court reporter, I was present in the hearing in said cause and while there took down in shorthand, all of the oral testimony adduced, and the proceedings had. That I have transcribed my said shorthand notes into typewriting; and that the foregoing typewritten matter is a full, true and correct transcript of my shorthand notes.

/s/ FRED L. BAKER,

Official Court Reporter.

[Endorsed]: Filed May 20, 1946.

[Endorsed]: No. 11353. United States Circuit Court of Appeals for the Ninth Circuit. Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Company, a corporation, Appellants, vs. United States of America, for the use of Bert Turner, Frank E. Hinman and Garland D. England, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed June 12, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11353

UNITED STATES OF AMERICA for the use
of BERT TURNER, FRANK E. HINMAN
and GARLAND D. ENGLAND,

Plaintiff and Respondent,

vs.

BASICH BROTHERS CONSTRUCTION CO.,
a corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants and Appellants.

STATEMENT OF POINTS ON APPEAL

To the Honorable Paul P. O'Brien, Clerk of the
above entitled Court, and to Clifford R. McFall,
Esq., and Ralph W. Bilby, Esq.:

Appellants will rely upon the following points on
appeal:

(1) Were Andrew Duque and Carson S. Frazzini a co-partnership, doing business under the name of Duque & Frazzini, General Contractors, to whom the use plaintiffs furnished material or rendered services, being the basis of the Judgment rendered herein, material-men or sub-contractors of Basich Brothers Construction Co., the prime contractor?

(2) Are the use plaintiffs legally entitled to re-

cover from appellants under and pursuant to the Act of Congress known as the Miller Act, approved August 24, 1935, c642, 49 Stat. 793, 40 U.S.C.A., 270a, et seq., for the services rendered and material furnished to said Duque & Frazzini?

/s/ STEPHEN MONTELEONE,

/s/ OWEN F. GOODMAN,

Attorneys for Appellants.

(Affidavit of Mailing attached.)

[Endorsed]: Filed June 12, 1946. Paul P. O'Brien, Clerk.

